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Supreme Court of the United States

OCTOBER TERM, 1963

No. ~~663~~ 16

ELIZABETH SIMONSON KING, ETC., ET AL.,
PETITIONERS.

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 2, 1963
CERTIORARI GRANTED JANUARY 13, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 654

ELIZABETH SIMONSON KING, ETC., ET AL.,
PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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[fol. A] [File endorsement omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff,

v.

GEORGE STEWART KING and NATIONAL SURETY CORPORATION, a Corporation of the State of New York, Defendants.

APPENDIX

DOCKET ENTRIES

Civil 749-58

Date	Filings—proceedings	Amount reported in emolument returns
7- 8-58	Complaint, filed 7-3-58	V
7- 8-58	Summons issued	V
7- 8-58	Notice of Allocation and Assignment, filed. (Newark-Wortendyke.)	V
7-29-58	Summons returned served on National Surety Corp. on 7-14-58; served on George Stewart King on 7-22-58, filed 7-28-58	V
8- 6-58	Stipulation and order extending time of National Surety Corp., to answer to 8-28-58, filed. (Smith.) Notice mailed	V
8-13-58	Stipulation and order extending time of George Stewart King to answer to 9-11-58, filed 8-12-58. (Hartshorne.) Notice mailed	V
8-28-58	Stipulation and order extending time of National Surety Corp. to answer to 10-2-58, filed 8-27-58. (Wortendyke.) Notice mailed	V

Date	Filings—proceedings	Amount reported in emolument returns
10- 1-58	Defendant's (George S. King) notice of motion for summary judgment, returnable 11-24-58 and acknowledgments of service filed 9-30-58. (No brief.)	V
10- 3-58	Notice of motion of National Surety Corp., for summary judgment, returnable 11-24-58 filed 10-2-58. (No brief.)	V
10- 3-58	Affidavit of Service of copy of motion for summary judgment filed 10-2-58	V
11-14-58	Stipulation and order adjourning motions to dismiss complaint to 12-8-58, filed 11-13-58. (Wortendyke.) Notice mailed	V
2-25-59	Ordered hearing on motion of George Stewart King, for summary judgment adjourned without date. (Wortendyke.) (2-24-59.)	
2-25-59	Ordered hearing on motion of National Surety Corp., for summary judgment adjourned without date. (Wortendyke.) (2-24-59.)	
4-10-59	Notice of motion by plaintiff to substitute party defendant, and affidavit of service, filed 4-9-59 (ret. 4-27-59). (No brief submitted.)	V
4-15-59	Copy of notice of motion by plaintiff to substitute party defendant, with Marshal's return thereon, filed	V
4-28-59	Proclamation made of plaintiff's motion to substitute party defendant. Counsel indicated consent order to be submitted. (Wortendyke.) (4-27-59.)	
5-20-59	Substitution of attorney for defendant George Stewart King, filed	V

Date	Filings—proceedings	Amount reported in emolument returns
6-16-59	Consent order substituting party defendant, filed 6-15-59. (Wortendyke.) Notice mailed	V
9-16-60	*Answer* of National Surety Corporation filed	V
10- 3-60	*Answer* of Elizabeth Simonson King, as Executrix, etc., filed	V
1- 4-61	*Pre-trial Conference* (Wortendyke.) (1-3-61.)	
1-12-61	Order re pre-trial transcript, filed 1-11-61. (Wortendyke.) Notice mailed	V
1-17-61	Transcript of pre-trial conference, filed 1-16-61	V
6-19-61	Stipulation of Facts filed	V
9-13-62	Opinion, filed. (Wortendyke.) (Complaint to be dismissed.) (Copy forwarded to U.S. Attorney General, Washington, D.C.)	V
10- 9-62	Order of Dismissal without costs, filed 9-8-62. (Wortendyke.) Notice mailed	V
12- 6-62	Notice of Appeal filed 12-3-62	V
12- 6-62	Copies of notice of appeal sent to Crummy, Gibbons & O'Neill, Esqs., Boyd, Dodd, Keer & Booth, Esqs., and Clerk, U.S.C.A.	
1- 2-63	Record on Appeal forwarded to Clerk, U.S.C.A.	

[fol. 2]

IN UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action

UNITED STATES OF AMERICA, Plaintiff,

v.

GEORGE STEWART KING and NATIONAL SURETY CORPORATION, a Corporation of the State of New York, Defendants.

COMPLAINT

The plaintiff, United States of America, by Chester A. Weidenburner, United States Attorney for the District of New Jersey, appearing by Barbara A. Morris, Assistant United States Attorney, brings this action of a civil nature against George Stewart King, individually and as Distributing Agent of Seeley Tube & Box Company, and against National Surety Corporation, under the provisions of Title 28 U.S.C. 1345 and says:

Count 1

1. Defendant, George Stewart King, resides in the Town of Montclair, County of Essex, within the District of New Jersey.

2. On October 1, 1946, Seeley Tube & Box Company, Inc., a corporation of the State of New Jersey, filed a Petition for Reorganization under Chapter XI of the Bankruptcy Act (11 U.S.C. 732.) Pursuant to an Order of Referee Cahill filed on March 22, 1947, the defendant, George Stewart King, was appointed Distributing Agent and entered into performance of the duties of that office. On the same date, the defendant filed a bond in the amount of $10,000 for faithful performance of his duties. On March 21, 1952, by order of Referee Cahill, the bond was reduced to $4,000.

[fol. 3] 3. The schedules accompanying the said petition did not list the United States as a creditor, however, contract #W-28-017-ORD-1240 dated June 24, 1946 and contract #W-28-017-ORD-1207 dated June 13, 1946 between the Picatinny Arsenal, War Department, United States of America, and the Seeley Tube & Box Company, Inc., were listed as executory contracts.

4. On November 18, 1946, because of the bankrupt company's default, the aforesaid contracts were terminated by letter directed by the United States Army to Seeley Tube & Box Company, Inc.

5. On February 28, 1947, leave was granted to file an amended plan of arrangement providing for payment in full to all unsecured creditors. The said amended plan was confirmed, following a hearing on March 24, 1947. In the course of that hearing, counsel for the defendant admitted the existence of the Government's claim and represented to Referee Schenck that there was then available $94,000 and that there would be available at all times the sum of $20,000 for payment of that claim.

6. Thereafter, by order of the Bankruptcy Court dated April 14, 1947, the United States was directed to file its claims against Seeley Tube & Box Company, Inc. on or before May 9, 1947.

7. On May 9, 1947 the Government filed a proof of claim for $26,818.82 asserting priority under the provisions of 11 U.S.C. 104, 737 and 702 and Sections 3466 and 3467, as amended, of the Revised Statutes, U.S.C. 191, 192. On March 30, 1949, after the damages sustained by the Government had been more accurately determined, an amended proof of claim for $34,125.03 was filed.

8. On February 17, 1950, the defendant, on behalf of Seeley Tube & Box Company, Inc., petitioned the Bankruptcy Court to re-examine the Government's claim alleg-[fol. 4] ing, among other things, that the Government's proofs of claim were not filed within time.

9. On December 8, 1953, following the hearing on the aforesaid petition for re-examination, Referee Cahill dis-

termined that the claim of the United States was filed in time and that the amended plan of the bankrupt corporation had been confirmed upon the condition that adequate provision had been made for payment of the Government's claim in the event it was determined allowable in an amount not in excess of $94,000.

10. On April 2, 1954, Referee Cahill's determination was reversed by the United States District Court for the District of New Jersey (by order of Honorable Alfred E. Modarelli, United States District Court Judge).

11. An appeal was taken from the District Court's ruling and on January 1, 1955 the Court of Appeals for the Third Circuit reversed and held that defendant's counsel's representations at the hearing on the confirmation was tantamount to an informal amendment of the bankrupt's schedules and the Government had become a creditor at that time.

12. On February 9, 1955 the Court of Appeals for the Third Circuit denied a rehearing; on October 1, 1955 certiorari was denied by the Supreme Court of the United States.

13. By order of Referee Tallyn dated August 2, 1956, the reorganization proceeding was concluded, the defendant discharged as distributing agent and the bond issued by the National Surety Company was cancelled. The Government did not receive notice of termination of these proceedings.

14. The Final Petition and Report of the distributing agent, a copy of which is attached hereto and marked Exhibit "A", filed on May 3, 1956, reflects that assets in [fol. 5] the amount of $160,193.68 were distributed to creditors and that on the date of filing, there remained for application to the Government's claim for $34,125.03, the sum of $3,620.39 despite the fact that the United States was a priority creditor under the provisions of 11 U.S.C. 104 and 31 U.S.C. 191.

15. Distribution of assets as aforesaid were made in violation of 31 U.S.C. §191 and 192.

16. Demand has been made upon the defendant, George Stewart King, by the plaintiff for the sum of $34,125.03. Seeley Tube & Box Company, Inc. has been credited with the sum of $1,486.33; additionally, payments totalling $6,807.62 have been received from the bankrupt company and there remains due to the plaintiff the sum of $25,831.08.

Wherefore, plaintiff, United States of America, demands of the defendant, George Stewart King, the sum of $25,831.08 together with interest and costs of suit to be taxed.

Count II

1. The defendant, National Surety Corporation, a New York corporation, has its place of business in Newark, New Jersey, within the jurisdiction of this court.

2. On or about May 17, 1947, the National Surety Company, as surety, made and executed a certain performance bond binding it to the United States of America in the amount of $10,000 to secure faithful performance by George Stewart King of his duties as distributing agent of the Seeley Tube & Box Company, now known as the National Surety Corporation, the defendant herein.

3. Plaintiff repeats the allegations of paragraphs 2 through 16 of the First Count of the complaint.

[fol. 6] 4. Demand has been made upon the said defendant as surety for the aforesaid sum of $10,000 inasmuch as the individual defendant, George Stewart King, has failed to distribute to the United States of America the amount to which it was entitled in the aforementioned reorganization proceeding.

5. The defendant surety company which has guaranteed performance has declined to complete its contract as surety.

Wherefore, plaintiff, United States of America, demands of the defendant, National Surety Corporation, judgment in the sum of $10,000.

Chester A. Weidenburner, United States Attorney.
By Barbara A. Morris, Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

ANSWER OF ELIZABETH SIMONSON KING
Filed October 3, 1960

Defendant, Elizabeth Simonson King, as Executrix of the Estate of George Stewart King of Montclair, Essex County, New Jersey, says:

Answer to First Count

1. She admits the allegations of paragraph 1 and 2 of the complaint herein as of the date of the filing of said complaint but says that George Stewart King has since died leaving an insolvent estate.

2. She has insufficient knowledge and therefore denies the allegations of paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 of the complaint except that she admits George Stewart King was properly discharged as distributing agent.

[fol. 7] Answer to Second Count

1. She has insufficient knowledge and therefore denies the allegations of paragraphs 1, 2, 3, 4 and 5 of the second count of the complaint herein.

First Separate Defense

The obligation of the Distributing Agent was to distribute the funds in compliance with the Order of the Bankruptcy Court. Each and every check signed by the Distributing Agent was pursuant to an Order entered by the Court. This being the case, this defendant cannot be liable for the compliance with the Orders of the Court.

Second Separate Defense

The plaintiff had the right to commence an action against distributees of the estate for the amount by which they were unjustly enriched by virtue of the fact that the plaintiff's priority claim was not paid from the estate. The plaintiff, knowing of this fact, elected not to institute such an action

and elected to defer institution of a suit against the defendants until long after the Statute of Limitations had run on any suit against the distributees. As a result of this, this defendant would have no right to recover from any of the distributees the amounts paid to them in excess of their entitlement from the estate. The plaintiff is, therefore, estopped from maintaining this action against the defendant, Elizabeth Simonson King as Executrix of the Estate of George Stewart King.

[fol. 8] Third Separate Defense

The plaintiff has failed to state a cause of action upon which relief can be granted.

Boyd, Dodd, Keer & Booth, Attorneys for the Defendant, Elizabeth Simonson King, as Executrix of the Estate of George Stewart King. By David S. Bate, A member of the firm.

In United States District Court

Answer of National Surety Corp.—
Filed September 16, 1960

Defendant, National Surety Corporation, a corporation of the state of New York, with its principal office in this state at 820 Broad Street, Newark 2, New Jersey, says:

Answer to First Count

1. The defendant admits to Paragraphs 1 and 2 of the complaint.

2. The defendant has insufficient knowledge and, therefore, denies the allegations of Paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the complaint.

3. The defendant admits the allegations of Paragraph 13 of the complaint except that it denies that the plaintiff did not receive notice of the termination of the proceedings. The defendant denies the allegations of Paragraphs 14, 15 and 16 of the complaint.

Answer to Second Count

1. The defendant admits the allegations of Paragraphs 1 and 2 of Count II of the complaint.

2. The defendant repeats its answers of Paragraphs 3 through 16 of the First Count of the complaint.

3. The defendant admits that a demand has been made upon it in the amount of $10,000 but denies that the Dis- [fol. 9] tributing Agent failed to perform any obligation owed to the plaintiff.

4. The defendant denies the allegations of Paragraph 5 of the Second Count of the complaint.

First Separate Defense

The obligation of the Distributing Agent was to distribute the funds in compliance with the Order of the Bankruptcy Court. The obligation of the surety was only conditioned upon the performance of the Distributing Agent of the terms of the Order of the Court. Each and every check signed by the Distributing Agent was pursuant to an Order entered by the Court. This being the case, the surety cannot be liable for the compliance by the principal with the Orders of the Court.

Second Separate Defense

The plaintiff had the right to commence an action against distributees of the estate for the amount by which they were unjustly enriched by virtue of the fact that the plaintiff's priority claim was not paid from the estate. The plaintiff, knowing of this fact, elected not to institute such an action and elected to defer institution of a suit against the defendants until long after the Statute of Limitations had run on any suit against the distributees. As a result of this, the defendants would have no right to recover from any of the distributees the amounts paid to them in excess of their entitlement from the estate. The plaintiff is, therefore, estopped from maintaining this action against the defendant, National Surety Corporation.

[fol. 10] Third Separate Defense

The plaintiff has failed to state a cause of action upon which relief can be granted.

Crummy, Gibbons & O'Neill, Attorneys for Defendant, National Surety Corporation. By Paul T. Murphy, A Member of the Firm.

In United States District Court

Order of Referee in Bankruptcy, March 17, 1947, paragraph 2

2. G. Stewart King is hereby appointed distributing agent of Seeley Tube & Box Company, debtor, and the debtor is hereby directed to deposit with said G. Stewart King as disbursing agent, on or before March 19, 1947 the consideration to be distributed to creditors, the money necessary to pay all debts which have priority, and the money necessary to pay the costs and expenses of the proceedings in such amounts as the court may determine; the said distributing agent being hereby directed on receipt of such consideration to deposit said funds in an account to be opened in any qualified bankruptcy depository in this district, subject to the control and order of this court.

In United States District Court

Order in Bankruptcy, March 21, 1947, paragraph 2

2. G. Stewart King, as distributing agent of debtor be, and he is hereby authorized, directed and empowered to distribute the monies deposited with him for the purpose of consummating the arrangement, by checks to be drawn and signed by the said distributing agent and counter signed by this Court in accordance with the terms of the orders of dis-[fol. 11] tribution to be hereafter made and entered by the Court;

In United States District Court

Opinion of District Court—September 13, 1962

Wortendyke, District Judge: This action is against the executrix of a deceased Distributing Agent for a bankrupt in a Chapter XI proceeding, under 11 U.S.C. §§ 701, et seq., to recover the amount of a debt due from the Debtor to the United States, and also against the surety upon the Agent's bond (to the extent of the penalty of $10,000 thereof). Plaintiff bases its alleged right to recover upon the provisions of 31 U.S.C. § 192.[1] Plaintiff asserts the priority (31 U.S.C. § 191) of its claim against cash assets of Debtor in the hands of the Agent which were disbursed by the Agent to non-priority creditors of the Debtor. The Agent died testate, after the commencement of this action, and his executrix was substituted as a defendant in his stead. The case has been submitted to the Court, sitting without a jury, upon the following stipulation of facts:

> This stipulation is entered into by and between the United States of America as plaintiff and Elizabeth Simonson King as personal representative of George Stewart King, defendant, deceased, and National Surety Corporation.
>
> Paul T. Murphy, Esquire, is appearing for National Surety Corporation, and has been authorized by David S. Bate, Esquire, of Boyd, Dodd, Keer & Booth, Es-[fol. 12] quires, to appear on behalf of the defendant Elizabeth Simonson King for the purpose of making the within stipulation.
>
> This stipulation is made pursuant to the direction of the Court contained in the pretrial order dated January 3, 1961.

---

[1] This section provides that every "executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for * * * which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

It is stipulated by and between the parties hereto that the following facts shall constitute the record in the trial of this cause without testimony or proof on behalf of any party, subject to objections, if any, as to materiality and relevancy, and subject to the right of any party to introduce at the trial of the cause any evidence not inconsistent herewith upon five days notice prior thereto to all parties:

1. There is jurisdiction in this court by virtue of the status of the plaintiff, the United States of America. This action was commenced on July 3, 1958.

2. On October 1st, 1946, Seeley Tube and Box Company, Inc., a corperation of the State of New Jersey, filed a petition for reorganization under Chapter XI of the Bankruptcy Act (11 U.S.C.). Pursuant to an order of Referee Cahill entered on March 17, 1947, and filed on March 22, 1947, the deceased George Stewart King was appointed distributing agent and entered into performance of the duties of that office. On the same date the deceased George Stewart King filed a bond of the Defendant National Surety Corporation in the amount of $10,000 for the faithful performance of the duties of George Stewart King. On March 21, 1952, by order of Referee Cahill the bond was reduced to $4,000.

3. The claim of Plaintiff United States of America arose out of default of Seeley Tube and Box Company, Inc., under contracts dated July 13 and 24, 1946, with the United States, and represents the excess costs incurred by the United States in completing the con- [fol. 13] tracts. Two letters dated October 11, 1946, were addressed to the debtor by the Ordinance Department, Dover, New Jersey, advising of an intention to terminate the contracts because of default, and on November 18 and 19, 1946, debtor was notified by the Ordinance Department of the termination of the contracts and of the intention to hold the debtor liable for any excess costs.

4. The Plaintiff United States of America was not scheduled as a creditor in the petition filed by the debtor corporation. The contract between the plaintiff and debtor corporation was listed as an executory contract on the schedules annexed to the petition.

5. An amended plan of arrangement was confirmed following a hearing on March 21, 1947.

6. The debtor corporation deposited with the distributing agent the sum of $160,193.68 in order to consummate the plan of arrangement. This sum was distributed pursuant to orders of the Court by checks signed by the distributing agent and countersigned by the referee. No written provision was contained in the plan of arrangement for payment of plaintiff's claim.

7. Part of the statement made on the record on March 21, 1947, by the Referee and the attorney for the debtor was as follows:

"The Referee. Is there a claim of the Picatinny Arsenal?

"Mr. Freeman. The Picatinny Arsenal may have some claim.

"The Referee. Have we put up enough money to meet it?

"Mr. Freeman. No.

"The Referee. Is there a problem there?

"Mr. Freeman. We do not owe them any money, and we want to bring them in. I want to state to your Honor further that the debtor company will deposit any sum of money that is represented by any claim [fol. 14] that the Picatinny Arsenal may file in these proceedings within a time that your Honor directs them to file it.

"The Referee. Have you any notion of what they might claim?

"Mr. Freeman. We think they may claim $20,000.

"The Referee. Have you $20,000 available?

"Mr. Freeman. We have $94,000 available to pay them if necessary, and we represent to your Honor

that there will be at all times $20,000 or more available to dispose of that claim, in cash * * *

* * * * * * *

"Mr. Freeman. I have a further application to limit the time of the United States of America to file a claim in this proceeding. And I am now handing your Honor a petition and order to show cause.

"The Referee. There is a provision in the statute—

"Mr. Freeman. Yes, there is.

"The Referee. I want to see it.

"Mr. Freeman. It is Section 369.

"The Referee. Section 369 says under proved debts:

"'1. Have been proved but not allowed or disallowed, prior to the date of confirmation; or "unliquidated debts."

"'2. Are disputed or unliquidated, have been scheduled by the debtor, and are proved within such time as the Court may direct; or "Arising from rejection of executory contracts."

"'3. Arise from the rejection of executory contracts by the debtor and are proved within such time as the Court may direct.'"

This comes within the last category.

"Mr. Freeman: Yes; that is the last category.

"The Referee: Well, I will sign this order and let Miss Robinson fix the date. * * *"

[fol. 15] The records of the Clerk of the Bankruptcy Court reflect the appearance of "G. Stewart King", distributing agent and president of the debtor corporation, in court on that date.

8. On April 14, 1947, an order was entered directing the United States of America to file its claim on or before May 9, 1947.

9. On May 9, 1947, the United States of America filed its preliminary contingent proof of claim in the

amount of $26,818.82. The aforesaid claim alleged that the United States of America was a priority creditor.

10. On May 9, 1947, the distributing agent had in his hands the sum of $6,085.01, which was subsequently distributed as follows:

United States of America	$3,620.39
Creditors having a priority to United States of America	1,057.55
Creditors not having a priority	1,407.07
	6,085.01

11. Each check was issued pursuant to an order of the Court and countersigned by the Referee in Bankruptcy.

12. On March 30, 1949, the plaintiff amended its claim to $34,125.03, the final amount of the claim as allowed.

13. On December 8, 1953, Referee Cahill determined that the claim of the United States was filed in time and that the amended plan of the bankrupt corporation had been confirmed upon the condition that adequate provision had been made for payment of the Government's claim in the event it was determined to be allowable in an amount not in excess of $94,000.

14. On April 2, 1954, Referee Cahill's determination was reversed by the United States District Court for the District of New Jersey by Order of the Honorable Alfred E. Modarelli, United States District Court Judge.

15. An appeal was taken from the District Court's ruling, and on January 1, 1955, the Court of Appeals for the Third Circuit reversed and held, "The dis- [fol. 16] closure by the debtor at the referee's hearing on confirmation of the plan that the Government had become a creditor was therefore in performance of its duty under the Act and amounted to an informal amendment of the list of creditors included in the debtor's schedules." Rehearing was denied on February 9, 1955. Certiorari was denied on October 1, 1955, by the United States Supreme Court.

16. On May 3, 1956, the distributing agent filed his final report and account with the clerk of the bankruptcy court.

17. On August 2, 1956, the final report and account was allowed, the distributing agent was discharged and the surety bond was discharged.

18. The Defendant National Surety Corporation received its first notice of any claim under its bond by letter dated May 7, 1958, from the plaintiff demanding payment of the sum of $4,000, being the reduced amount of its bond.

In addition to the foregoing it is stipulated that any party may offer all or any part of any pleading or other record on file in the matter of Seeley Tube and Box Company, Inc., Debtor, subject to objections as to materiality and relevancy.

It is further stipulated that the foregoing stipulation shall be filed with the court by the attorney for Defendant National Surety Corporation within one week of the date that copies of the foregoing stipulation are mailed to the attorneys for the respective parties, and that in the event any attorney for any party has objection to any provision of the foregoing stipulation such objection shall be made known prior to the filing of the within stipulation with the court, and that the stipulation shall be filed without the necessity of execution by the attorneys.

(Certified a true copy by Ashley B. Carrick, C.S.R.)

(Filed June 9, 1961.)

[fol. 17] I find the facts as stipulated. In sum, King, a distributing agent, appointed by a Referee in Bankruptcy pursuant to 11 U.S.C. § 737(1), to receive and distribute, "subject to the control of the Court" a fund of $160,193.68 deposited by Seeley Tube and Box Company, Inc., Debtor, under Chapter XI of the Bankruptcy Act, did, between March 21, 1947 and March 7, 1956, pay and distribute to other creditors of Debtor all but $3,620.39 of the moneys

in his hands, before paying a debt of $34,125.03 due to the United States from the Debtor. National Surety Corporation, as surety, with King as principal, gave bond in the penal sum of $10,000, pursuant to the Referee's order of March 17, 1947, conditioned for the performance by King of his duties as Distributing Agent for Seeley Tube and Box Company, Inc., Debtor, under Chapter XI of the Bankruptcy Act. After allowance of a credit to the Debtor in the sum of $1,486.33 and deduction of a receipt from the Debtor of $6,807.62, there remained due to the United States, as a priority creditor, on the date of the commencement of this action (July 3, 1958) the sum of $25,831.08. However, all of the moneys which were deposited with the Distributing Agent, except $6,085.01, had been paid out by him, in compliance with the Referee's orders, *before May 9, 1947*, the date on which the Government's preliminary, contingent proof of claim for $20,818.82 was filed, which was not amended to the amount of $34,125.03 until March 30, 1949. The plan of arrangement contained no written provision for payment of plaintiff's claim out of the sum deposited with the Distributing Agent.

Discussion

On March 21, 1947, during the course of a hearing before the Referee in Bankruptcy, upon the application of [fol. 18] the Debtor for confirmation of an amended plan of arrangement, and in the presence of George Stewart King, the Referee inquired respecting a contingent claim of the Government in connection with a contract or contracts between the Debtor and Picatinny Arsenal, an agency of the Government. This contingent claim had not originally been listed in the Debtor's bankruptcy schedules. The attorney for the Debtor admitted that the Government might have some claim, and in response to the Referee's further inquiry, estimated that the claim might amount to $20,000, and added: "We have $94,000 available to pay them if necessary, and we represent to your Honor that there will be at all times $20,000 or more available to dispose of that claim in cash." At the time the foregoing representation was made, King had already been appointed

Distributing Agent of the Debtor by the Order of the Referee dated March 17, 1947, which directed the giving of the bond hereinbefore referred to.

Annexed to the complaint in this case as an exhibit is a document purporting to be an unexecuted copy of the final petition and report of the Distributing Agent to the Referee in Bankruptcy, setting forth that on March 17, 1947 the Agent deposited in his official account the sum of $160,193.68, and listing a succession of 92 checks of various dates between March 21, 1947 and March 7, 1956, in varying amounts, to various payees, aggregating the amount of the bank deposit. Included in these disbursements was that of March 7, 1956 to the United States of America, purporting to be "on account" of the Government's claim, and represented to be the balance in the hands of the Agent. Leave was granted to the Government to file its claim on or before May 9, 1947 by the Referee's order of April 14, 1947. The Government's claim was filed within the time limited. [fol. 19] On February 17, 1950, during the course of the performance of his duties as Distributing Agent, King petitioned the Bankruptcy Court to reexamine the Government's claim and contended that it was not filed within time. By his Order of December 8, 1953, the Referee determined that the Government's claim had been timely filed, in the amount of $34,125.03. Although the District Court reversed the Referee's determination in this regard on April 2, 1954, the Third Circuit Court of Appeals reversed the District Court on January 1, 1955 and denied a rehearing thereon on February 9, 1955. Certiorari was denied by the Supreme Court of the United States on October 1, 1955.

By his order of August 2, 1956, the Referee discharged King as Distributing Agent and cancelled his bond without notice to the plaintiff.

In the light of the facts set forth in the Stipulation and disclosed by the record in the bankruptcy proceedings involving Seeley Tube and Box Company, the Government's reliance in this action upon the provisions of 31 U.S.C. § 192 is misplaced. At the outset, the question is posed whether King, by virtue of his appointment by the Referee in Bankruptcy as Distributing Agent in the Chapter XI proceedings, thereby became included in the category of

those whose liability is created by the language of the statutory section relied upon. In other words, we are here called upon to determine whether King was an "executor, administrator or assignee or other person" who paid "any debt due by the person or estate for whom or for which he acts" before satisfying the debts due to the United States from such person or estate. An analogous question was before the Court in *United States v. Stephens*, 5 Cir. 1953, [fol. 20] 208 F. 2d 105. In that case the statute here relied upon was sought to be applied to the Receiver of an insolvent in a state court proceeding, and the Court of Appeals affirmed the District Court in dismissing the action upon the ground that the Receiver was not within the category to which liability under the statute would extend. The Stephens case, in construing and interpreting the statute, adhered to the principle that an action based entirely upon the statute "must find its warrant in the statute" precluding a Court "upon the pretense of construing it" from enlarging "its coverage to bring within it those not expressly or by clear intendment embraced within its terms." (P. 107.) By applying that test the Court necessarily reached the conclusion not only that a Receiver was *not* among the persons expressly mentioned by the statute, but that the Receiver's custody of property in the insolvency proceeding was "that of the law or of the court" and that the actions of the Receiver in taking and retaining custody were those of an agent of the court. Since, therefore, the Receiver was a ministerial officer acting as an arm of the Court, he derives his authority from the Court and is subject only to its order. In rejecting the contention that the Receiver there involved was within the phrase "or other person" employed in the statute, the Court, in Stephens, limited the category described by that phrase "to those who stand as personal representatives not only by the application of the principle of *ejusdem generis* but by the language qualifying 'person' as one 'who pays in whole or in part any debt due *by the person or estate for whom or for which he acts.*'" (P. 108.) The dismissal of the action in the Stephens case was affirmed because of the *failure* of the Government to show "that the defendant is either an executor, administrator or assignee of the debtor; or, if not, that he

[fol. 21] stands to the debtor as agent or in some other representative capacity and, as such agent or representative, has paid the debt due the United States; and that thus, as such agent or representative, he has defeated the priority accorded to debts of the United States." (P. 103.)

A later case based upon section 192 and involving a Receiver, *United States* v. *Crocker*, D.C. Nev. 1951, 194 F. Supp. 860, cited and followed the Stephens case, supra. *In re J. B. Pollack Co.*, 2 Cir. 1936, 86 F. 2d 99, relied upon by the Government, is distinguishable from Stephens, supra, and from the case at bar, because the distributing agent in Pollack made the payments which depleted the fund without a proper Court order.

In re Empire Shoe Corp., D.C.N.Y. 1936, 16 F. Supp. 713, denied a creditor's claim against a distributing agent where the agent had relied on the Court's order in making his distribution and had not acted in bad faith.

In the case at bar, King was not an executor, administrator or assignee, or other person, who acted for the Debtor by paying Debtor's general creditors before paying the debt owned by the Debtor to the United States. An examination of the Referee's order of March 17, 1947 reveals that it directed the Debtor to deposit with King, as Distributing Agent, on or before March 19, 1947, the consideration to be distributed to creditors, the money necessary to pay all debts which had priority, and to pay the costs and expenses of the proceedings as the Court might determine. The same order directed King, as Distributing Agent, on receipt of such moneys, to deposit them in an account to be opened by him in any qualified bankruptcy depository in the District, *subject to the control and orders of the Bankruptcy Court*. The Plan of Arrangement came [fol. 22] on for hearing and confirmation on March 21, 1947, and on that day King, as Distributing Agent, was directed to distribute the moneys which had been deposited with him "by checks to be drawn and signed by the said distributing agent and countersigned by this Court in accordance with the terms of the orders of distribution to be hereafter made and entered by the Court * * *." Further, on the same date, the Referee signed orders and arrangement sheets upon the authority of which King prepared,

signed and sent to the Referee for countersignature, checks in the indicated amounts, to the named payees totalling $149,422.20. On the basis of further arrangement sheets, signed by the Referee on March 28, 1947, additional checks were signed by King and sent to the Referee for countersignature in a total amount of $4,995.40.

It was not until May 9, 1947 that the Government filed its liquidated claim for $26,818.82, which was amended on March 30, 1949 to $34,125.03, and ultimately allowed as amended. When the Government's claim was initially filed in a liquidated amount there remained in the hands of the Distributing Agent only $6,085.01. The remainder of the moneys which had been deposited with him had theretofore been disbursed by him by checks signed by him and countersigned by the Referee, all upon specific orders of the Referee.

Of this balance of $6,085.01, $3,620.39 was subsequently paid on account of the claim of the United States, and $1,057.55 was paid to claimants having statutory priority to the claim of the United States. On May 3, 1956, after the Distributing Agent had paid out all of the moneys in his possession, he filed his final report, and obtained an [fol. 23] approval of his account and discharge from his office, together with the cancellation of his bond.

I do not reach the contention of the defendants that the Government is precluded from recovering in this action by reason of having *waived* its right to priority in the funds in the hands of King through failure to assert its right while the funds remained in the Distributing Agent's possession.

Liability of the defendant surety is dependent upon the liability of its principal. Since I have concluded that King was not liable under Section 192, no liability can be imposed upon the surety upon his bond.

Conclusions of Law

1. This Court has jurisdiction of the subject matter of this action under 28 U.S.C. #1345.

2. This Court has jurisdiction of the parties to this action.

3. The evidence fails to support the cause of action alleged in the complaint, which should be, and accordingly is, dismissed.

Submit an appropriate order.

Reynier J. Wortendyke, Jr., Judge, United States District Court.

IN UNITED STATES DISTRICT COURT

ORDER OF THE DISTRICT COURT—October 8, 1962

This matter having been opened to the Court by the attorney for the plaintiff, United States of America, David M. Satz, Jr., Esq., United States Attorney, James D. Butler, Esq. appearing; and the defendant, Elizabeth Simonson King, Executrix of the Estate of George Stewart King being represented by Boyd, Dodd, Keer & Booth, Esqs., David S. Bate, Esq. appearing; and the defendant, National Surety Corporation being represented by Crummy, Gibbons [fol. 24] & O'Neill, Esqs., Paul T. Murphy, Esq. appearing; and the parties having entered into a Stipulation of Facts, which Stipulation has been filed in the cause; and the Court having considered the Stipulation of Facts and the briefs submitted on behalf of all parties; it is on this 8th day of October, 1962,

Adjudged:

1. The facts are found as stipulated;

2. This Court has jurisdiction of the subject matter of this action under 28 U.S.C. § 1345;

3. This Court has jurisdiction to the parties of this action;

4. The evidence fails to support the cause of action alleged in the Complaint and judgment be and it is hereby entered dismissing the Complaint without costs.

Reynier J. Wortendyke, Jr., U.S.D.J.

We consent to entry of the within Judgment as to form.

David M. Satz, Jr., United States Attorney, Attorney for Plaintiff. By James D. Butler, Esq., Assistant United States Attorney.

Boyd, Dodd, Keer & Booth, Attorneys for Defendant, Elizabeth Simonson King. By David S. Bate.

Crummy, Gibbons & O'Neill, Attorneys for Defendant, National Surety Corporation. By Paul T. Murphy.

[fol. 25]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17,776

UNITED STATES OF AMERICA, Appellant

v.

A. D. CROCKER, Appellee

Appeal from the United States District Court for the District of Nevada.

OPINION IN UNITED STATES V. CROCKER—February 15, 1963

Before: Merrill and Browning, Circuit Judges, and Pence, District Judge.

Browning, Circuit Judge: The United States filed a complaint alleging that appellee, a receiver appointed by the Superior Court of the State of California, took possession of assets of a certain debtor, sold them, and distributed the proceeds to creditors other than the United States, although appellee knew that the debtor was insolvent and indebted to the United States for unpaid taxes. The complaint prayed for a personal judgment against appellee in the amount of the unpaid tax, based upon 31 U.S.C.A. § 192. The District Court dismissed the action on the ground that Section 192 is inapplicable to court-appointed receivers.[1]

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[1] 194 F. Supp. 860 (D. Nev. 1961).

[fol. 26] Sections 191[2] and 192[3] of Title 31 are part of a common statutory scheme,[4] the language of which is to be liberally construed to effectuate its public purposes.[5]
[fol. 27] Section 191 provides that debts due to the United States shall have priority when a decedent's estate is insufficient to satisfy all of its debts, or when a living debtor is insolvent and his insolvency is manifested in one of the ways specified in Section 191; i.e., by assignment for the

[2] "Whenever any person indebted to the United States is insolvent or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." 31 U.S.C.A. § 191; Rev. Stat. § 3466.

[3] "Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid." 31 U.S.C.A. § 192; Rev. Stat. § 3467, as amended.

[4] *United States* v. *Lutz*, 295 F. 2d 736, 742-43 (5th Cir. 1961). The provision for priority of debts due the United States, now found in Section 191, was enacted in its original form in 1789. *Price* v. *United States*, 169 U.S. 492, 500 (1926). The provision for personal liability of fiduciaries, now found in Section 192, was added in 1799, initially as a clause interposed between the two present clauses of Section 191. Act of March 2, 1799, c. 22, § 65, 1 Stat. 676. See *Conard* v. *Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386, 438-39 (1828). The present arrangement was adopted in incorporating these provisions in the Revised Statutes, and "did not work any change in the purpose or meaning." *Price* v. *United States*, 269 U.S. at 501.

[5] The statute "is founded not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens and discharge the public debts." *United States* v. *State Bank*, 31 U.S. (6 Pet.) 29, 34 (1832). "As this statute has reference to the public good, it ought to be liberally construed." *Boston* v. *Farmers' Bank*, 37 U.S. (12 Pet.) 102, 134 (1838).

benefit of creditors, by attachment of the effects of an absconding, concealed, or absent debtor, or by an act of bankruptcy. When the conditions establishing this priority under Section 191 are satisfied, the property of the debtor will ordinarily have passed to the control of a third person, and Section 192 provides that the preferred obligation to the United States is then to be satisfied "by the assignees, who are rendered personally liable, if they omit to discharge such debt or debts." *Conard* v. *Atlantic Ins. Co.*, 26 U.S. (1 Pet.) 386, 438 (1828). "When the debtor is divested of his property in one of the modes specified in the act, the person who becomes invested with the title is made trustee for the United States and bound first to pay its debt out of the debtor's property." *United States* v. *Oklahoma*, 261 U.S. 253, 260 (1923). And the statute does not require transfer of title or establishment of a formal trust; "divestment of possession and control without technical transfer of title is enough to bring the statute into operation."[7]

In *Bramwell* v. *United States Fidelity Co.*, 269 U.S. 483 (1926), the Supreme Court sustained the holding of this Court that debts due the United States were entitled to [fol. 28] priority under Sections 191 and 192 when possession and control of the property of an insolvent bank were transferred to the Superintendent of Banks of the State of Oregon for liquidation. It was argued that Section 191 did not apply. The Court said:

> The specification in § 3466 [Section 191] of the ways insolvency may be manifested is aided by the designation in § 3467 [Section 192] of the persons made answerable for failure to pay the United States first from the inadequate estates of deceased debtors or from the insolvent estates of living debtors. The per-

[7] See also *United States* v. *Kaplan*, 74 F. 2d 664, 666 (2d Cir. 1935). Section 191 "has no application to a payment by a stranger occupying no fiduciary capacity, as in the case of a debt due in the usual course of business to a solvent debtor." *United States* v. *Western Union Tel. Co.*, 50 F. 2d 102, 103 (2d Cir. 1931).

[8] 63 Yale L.J. 905, 906 n. 8 (1954). See *Bramwell* v. *United States Fidelity Co.*, 269 U.S. 483, 489-91 (1926).

sons held are "every executor, administrator, or assignee, or *other person*." The generality of the language is significant. Taken together, these sections mean that a debt due the United States is required first to be satisfied when the possession and control of the estate of the insolvent is given to any person charged with the duty of applying it to the payment of the debts of the insolvent, as the rights and priorities of creditors may be made to appear. (269 U.S. at 490.)

It follows, and the cases have held, that a receiver appointed by a federal or state court who takes possession and control of the assets of an insolvent debtor must first satisfy obligations due the United States under Section 191.[8] It likewise follows that a receiver who knowingly [fol. 29] distributes the assets in disregard of that priority is to be personally liable under Section 192.[9] It would be inconsistent with the scheme of Sections 191 and 192, and at odds with their purpose and with the rationale of *Bramwell*, to exclude receivers from personal liability under Section 192 when the conditions for priority under Section 191 have been satisfied.

It is true that court-appointed receivers are not expressly named in Section 192, and that they are officers of the court

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[8] Illinois ex rel. *Gordon* v. *Campbell*, 329 U.S. 362 (1946); *United States* v. *Texas*, 314 U.S. 480, 483-84 (1941); *United States* v. *Emory*, 314 U.S. 423, 426 (1941); *Spokane County* v. *United States*, 279 U.S. 80, 85, 93 (1929); *United States* v. *Butterworth-Judson Corp.*, 269 U.S. 504, 513-14 (1926); *Stripe* v. *United States*, 269 U.S. 503 (1926); *Price* v. *United States*, 269 U.S. 492 (1926); *Davis* v. *Pullen*, 277 Fed. 650, 655 (1st Cir. 1922).

[9] Cf. *Want* v. *Commissioner*, 280 F. 2d 777, 783 (2d Cir. 1960). See Annotation, 41 A.L.R. 2d 446, 450 (1955).

[10] *Pennsylvania Cement Co.* v. *Bradley Contracting Co.*, 274 Fed. 1003, 1006 (S.D.N.Y. 1920). But see *United States* v. *Stephens*, 208 F. 2d 105 (5th Cir. 1953); *United States* v. *Hicks*, 51 Am. Fed. Tax R. 1497 (S.D. Fla. 1956). The *Stephens* case has been criticized as "difficult to support." 9 Mertens, Federal Income Taxation § 54.12, a. 73. See 67 Harv. L. Rev. 1274 (1954).

and not primarily representatives of the parties. But it has been held that a trustee in bankruptcy,[11] a state official charged with liquidating a bank,[12] and an officer-director of a liquidating corporation[13] may be liable under Section 192 though none of these is within the classes of persons named. Moreover, a trustee in bankruptcy (like a court-appointed administrator, a class specifically named in Sec-[fol. 30] tion 192) is an officer of the court,[14] and neither a trustee in bankruptcy nor a state official acts primarily as agent for the parties.

The Court in *United States* v. *Stephens*, 208 F. 2d 105 (5th Cir. 1953), predicated its holding that court-appointed receivers were excluded from liability under Section 192 in part upon the ground that appointment of a receiver to distribute an insolvent's assets does not give rise to priority under Section 191. We understand the law to be to the contrary, as we have noted. The Court in *Stephens* also suggested that executors, administrators, and assignees are personal representatives of a decedent or debtor and therefore the meaning of the words "or other person" in Section 192 should be similarly confined, to the exclusion of a receiver who is "an officer or arm of the court, * * * not a representative of the parties,"[15] particularly in view of the reference in that section to payment by the fiduciary of debts due from "the person or estate for whom or for which he acts." But the debts paid by a liquidating re-

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[11] *United States* v. *Kaplan*, 74 F. 2d 664, 665 (2d Cir. 1935); *In re Anderson*, 279 Fed. 526, 527 (2d Cir. 1922) (dictum). Cf. *Want* v. *Commissioner*, 280 F. 2d 777, 783 (2d Cir. 1960).

[12] *Bramwell* v. *United States Fidelity Co.*, 269 U.S. 483 (1926); *United States ex rel. Ray* v. *Porter*, 24 F. 2d 139, 143 (D. Idaho 1927).

[13] *United States* v. *Lutz*, 296 F. 2d 736 (5th Cir. 1961). See 34 Taxes 477 (1956).

[14] 2 Collier Bankruptcy 1737 (14th ed.). A fiduciary is not relieved of liability because distribution in disregard of the Government's priority has been approved by the court. Cases are collected at 41 A.L.R. 2d 462 (1955).

[15] 208 F. 2d at 107.

ceiver, like those paid by an executor, administrator, or assignee for the benefit of creditors, are primary obligations of the debtor; the phrase "for whom, or for which he acts" should be read as a general acknowledgment of this fact rather than as imposing a restriction upon the reach of Section 192 inconsistent with the overall purpose of this section and Section 191. In terms of the purpose of the two sections, the significant characteristic which persons in the classes named in Section 191 have in common is "not that they represent debtors rather than courts, but [fol. 31] rather that they are given possession and control of assets of debtors and are charged with the payment of debtors' obligations. Under the rationale of *Bramwell*, any "other person" who answers this description is included in Section 192, if the debtor is insolvent.

We therefore hold that appellee's status as a court-appointed receiver does not immunize him from personal liability if he would otherwise be subject to such liability under Section 192.[16]

Reversed.

[File endorsement omitted]

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[16] We assume without deciding that the circumstances of this case were such that debts due the United States acquired priority under Section 191 (*Illinois* v. *Campbell*, 329 U.S. 462, 368-69 (1946)); that question was not raised here or in the District Court.

[fol. 32]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,297

UNITED STATES OF AMERICA, Appellant,

v.

ELIZABETH SIMONSON KING, Executrix of the Estate of George Stewart King, Deceased, and National Surety Corp., a corporation of the State of New York.

Appeal from the United States District Court for the District of New Jersey.

Argued June 3, 1963

Before Biggs, Chief Judge, and McLaughlin and Ganey, Circuit Judges.

OPINION OF THE COURT—Filed September 13, 1963

By Biggs, *Chief Judge*.

This is an appeal from a judgment dismissing the complaint of the United States on the ground that the evidence fails to support the cause of action alleged.

The action was brought by the United States against the executrix of George S. King,[1] a distributing agent for the [fol. 33] Seeley Tube and Box Company, a bankrupt in a Chapter XI proceeding, and against National Surety Cor-

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[1] King died testate after the commencement of the suit at bar, and his executrix was substituted as a party defendant in his stead pursuant to an order of the court entered on June 15, 1959.

An action by the United States against a fiduciary under Rev. Stat. § 3467, 31 U.S.C.A. § 192 does not abate and survives against his executrix. See United States v. Dewey, 39 Fed. 251 (C.C. S.D. N.Y. 1889).

poration, the surety on King's bond. The complaint alleges that the United States has a debt entitled to priority pursuant to 11 U.S.C.A. § 104 and Rev. Stat. § 3466, 31 U.S.C.A. § 191,[2] against Seeley's assets, that King, as Seeley's distributing agent, paid Seeley's other creditors before attempting to satisfy the priority claim in favor of the United States, and that as a result the bankrupt's assets were depleted so as to prevent full payment to the United States of its claim. The complaint further alleges that King, or his surety to the extent of the bond, is personally liable to the United States for the unpaid portion of the claim under Rev. Stat. § 3467, 31 U.S.C.A. § 192.[4]

The stipulated facts, as found below by the court below are as follows: On October 1, 1946, Seeley filed a petition for an arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C.A. § 701 *et seq.* King, the president of the

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[2] Section 191 of 31 U.S.C.A. provides as follows: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

[3] Section 104 of 11 U.S.C.A. provides in pertinent part: "(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (5) debts owing to any person, including the United States, who by the laws of the United States in [sic] entitled to prjority. . . ."

Section 192 of 31 U.S.C.A. provides as follows: "Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

debtor corporation, was appointed distributing agent[4] by an order of the referee filed on March 22, 1947, and he filed [fol. 34] a bond in the amount of $10,000 underwritten by the defendant surety company. King's duties were to receive a fund of $160,193.68 deposited by Seeley, deposit the fund in an account subject to the control of the bankruptcy court and to distribute the fund by checks drawn by him and countersigned by the referee in accordance with orders of distribution to be made by the referee.

A hearing on an amended plan of arrangement was held on March 21, 1947. The plan did not contain any "written provisions" for payment of the claim of the United States. However, during the course of the hearing counsel for Seeley admitted that the United States might have a claim as a result of terminated executory contracts between Seeley and Picatinny Arsenal, an installation of the War Department at Dover, New Jersey. Seeley's counsel further stated that $94,000 would be available to pay the Government's claim that "there will be at all times $20,000 or more available to dispose of that claim, in cash." On April 14, 1947, the referee entered an order directing the United States to file its claim on or before May 9, 1947.

On that due date, May 9, 1947, the United States filed a preliminary contingent proof of its claim in the amount of $26,818.82, and alleged that it was a priority creditor. However, during the time between the hearing on March 21, 1947 and the date on which the Government filed its claim, May 9, 1947, King, in his capacity as distributing agent, had paid out all but $6,085.01 of the fund deposited with him[5] to other creditors of Seeley. Each check drawn

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[4] Section 737 of 11 U.S.C.A. provides in pertinent part: "[T]he judge or referee shall, after the acceptance of the arrangement— (1) appoint the receiver or trustee, if any, or otherwise appoint some other person, to receive and distribute, subject to the control of the court, the moneys and consideration, if any, to be deposited by the debtor; require such person to give bond with surety to be approved by the court. . . ."

[5] King deposited the fund received by him from Seeley with the West Side Trust Company of Newark, New Jersey, and had it credited to his account as distributing agent for Seeley. See King's final petition and report, filed May 3, 1956, attached to the complaint of the United States as exhibit "A".

by King for these other creditors had been issued pursuant to specific court orders and had been countersigned by the referee.

[fol. 35] On March 30, 1949, the United States amended its claim of May 9, 1947 to $34,125.93, the final allowed amount of the claim. Of the $6,085.01 remaining of the fund in the hands of King, $5,620.39 was paid to the United States and the balance to other creditors.

On December 8, 1953, the referee determined that the claim of the United States had been filed in time and that the amended plan of arrangement had been confirmed upon the condition as had been stated by Seeley's counsel, that there would be an adequate sum available to satisfy the claim of the United States. The United States District Court for the District of New Jersey reversed the decision of the referee. In re Seeley Tube & Box Co., 120 F. Supp. 269 (D.N.J. 1954). This court reversed the district court and held that "The disclosure by the debtor at the referee's hearing on confirmation of the plan that the Government had become a creditor was . . . in performance of its duty under the Act and amounted to an informal amendment of the list of creditors included in the debtor's schedules." In the Matter of Seeley Tube & Box Co., 219 F.2d 389, 391 (3 Cir. 1955), *cert. denied*, 350 U.S. 821 (1955).

On August 2, 1956, the referee approved King's final report and accounting and discharged both King and the surety. The final amount outstanding on the claim in favor of the United States was $25,831.08 after allowance of proper deductions and credits.

On July 3, 1958, the United States commenced the suit at bar against King's executrix for the sum of $25,831.08, the balance outstanding on the claim, and against the surety for $10,000, the amount of its bond. The case was submitted to the district court below, sitting without a jury, upon the stipulated facts. The complaint was dismissed by an order entered on October 8, 1962. In its opinion[1] the court held that 31 U.S.C.A. § 192 did not apply to a distributing agent, and as King's executrix could not,

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[1] United States v. King, 208 F. Supp. 697 (D.N.J. 1962)

therefore, be liable, the surety must be exonerated as well. [fol. 36] It is the position of the United States on this appeal that King, as distributing agent, is within the class of persons on whom personal liability is imposed by 31 U.S.C.A. § 192 to the extent of a priority claim due the United States where such person exhausts or partially exhausts the debtor's fund by paying other creditors before the United States. The pertinent statute, 31 U.S.C.A. 192, is as follows: "Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

It appears therefore that the question for our determination is whether a distributing agent in a Chapter XI proceeding is an "executor, administrator, or assignee, or other person," within the meaning of the statute quoted.

Sections 191 and 192 of 31 U.S.C.A. must be interpreted *in pari materia*, as parts of a "common statutory scheme." United States v. Crocker, 313 F.2d 946, 947 (9 Cir. 1963). See United States v. Butterworth-Judson Corp., 269 U.S. 504, 513 (1926). See also United States v. Lutz, 295 F.2d 736, 742 (5 Cir. 1961): "The statutes [§§ 191 and 192] have an historical relation to the early efforts of the founding fathers to make this country a union and not a confederation of states. The precursor of Section 191 was enacted in 1797 to give the government a priority in the recovery of its debts from insolvent persons. When that section was reenacted in 1799 the forerunner of Section 192 was passed as a companion measure. This coincidence of enactment raises an inference that the two provisions should be read together as parts of a single legislative plan. The inference is confirmed by consideration of the operation and effect of Section 192. Construed in conjunction with Section 191, . . . the section promotes obedience to the require- [fol. 37] ment of Section 191 that government debts be given priority when a corporation is insolvent, and it pro-

tects the government's interest when that requirement is violated. It accomplishes this without overshooting the coverage of Section 191 and without burdening business operations except in cases of insolvency, when the government is in danger of being unable to collect its debts. It imposes the danger of personal liability on the corporate officers only at times when because of the shortage in funds they should be alert to the necessity for paying debts according to their priorities."

Taken together, then, Sections 191 and 192 impose two requirements both of which must be met if the United States is to prevail in an action such as that at bar. First, the debt owing to the United States must be one afforded priority under Section 191. Secondly, the fiduciary sought to be held personally liable for the debt under Section 192 must be either an "executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate. . . ." See United States v. Crocker, *supra* at 947-948. See also Bramwell v. United States Fid. & Guar. Co., 269 U.S. 483, 490 (1926).

That the debt owing from Seeley to the United States is one afforded priority under Section 191 is an issue that requires no extended discussion for the debt is clearly one within the list enumerated in that section. The fact that the United States did not formally file its claim or proof of claim at the hearing on the amended plan of arrangement does not alter the debt's priority status, nor can this factor alter the fiduciary's liability under Section 192. United States v. Kaplan, 74 F.2d 664 (2 Cir. 1935).

The second of these two requirements, that is, that the fiduciary sought to be held personally liable for the debt [fol. 38] be one within the net of liability cast by Section 192, does not admit of a short answer. We have been unable to find any direct authority on this point where the fiduciary involved is, as in the case at bar, a distributing agent.[7]

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[7] The fiduciary must, in addition, have notice of the claim in favor of the United States before making the distribution to the other creditors. Want v. Commissioner, 280 F.2d 777 (2 Cir. 1960).

In two cases involving a somewhat analogous fiduciary, a receiver, conflicting results were reached by two courts of appeals.

In United States v. Stephens, 208 F.2d 105 (5 Cir. 1953), a receiver appointed by a state court for an insolvent corporation had exhausted the debtor's fund by paying other creditors in advance of satisfying priority claims due to the United States. The United States commenced suit under Section 192 to hold the receiver personally liable for the debt, but the district court dismissed the complaint on the ground that Section 192 is not applicable to court-appointed receivers. The dismissal of the complaint was affirmed on appeal. The court of appeals pointed out that Section 192 does not specifically refer to a receiver in its enumeration of certain fiduciaries by title, and construed the additional, albeit somewhat vague, designation "or other person" as being "limited to those who stand as personal representatives not only by the application of the principle of *ejusdem generis* but by the language qualifying 'person' as one 'who pays in whole or in part any debt *due by the person or estate for whom or for which he acts.*'" United States v. Stephens, *supra*, at 108. (Emphasis in original). The court, asserting that a receiver is an officer or arm of a court acting for and under a court rather than for the debtor, concluded that a receiver is not within the purview of Section 192.*

In United States v. Crocker, *supra*, the Court of Appeals for the Ninth Circuit arrived at a different result than that reached by the Fifth Circuit in the Stephens case, *supra*, on similar facts. In Crocker, a receiver appointed by a state court took possession of the debtor's assets and distributed the proceeds of the sale of the assets to other [fol. 39] creditors although the receiver knew of the existence of a priority claim in favor of the United States. The complaint filed by the United States against the receiver, alleging personal liability under Section 192, was dismissed

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* The Stephens decision is criticized in 67 Harv. L. Rev. 1274 (1954).

by the district court.[9] The Court of Appeals reversed. In a thorough and comprehensive opinion by Judge Browning, the court held that Sections 191 and 192, read together, impose personal liability upon the person to whom control of a debtor's assets has passed after a divestment of the kind specified in Section 191 where such person has knowingly failed to pay a priority debt owing from the debtor to the United States. The court pointed out that the scope of Section 192 is not limited to those classes of fiduciaries specifically enumerated in it, and cited several cases in which fiduciaries outside the statutory enumeration were held personally liable, as, for example, a trustee in bankruptcy.[10] The court in Crocker did not accept the position taken in Stephens, *supra*, that Section 192 must be construed to encompass only those fiduciaries standing in a personal relationship to the debtor as his or its representative and that, therefore, a receiver, as a representative of the court rather than the debtor, could not be within the scope of the statute. Instead, the court in Crocker asserted: "[T]he debts paid by a liquidating receiver, like those paid by an executor, administrator, or assignee for the benefit of creditors, are primary obligations of the debtor; the phrase 'for whom or for which he acts' should be read as a general acknowledgement of this fact rather than as imposing a restriction upon the reach of Section 192 inconsistent with the overall purpose of this section and Section 191. In terms of the purpose of the two sections, the significant [fol. 40] characteristic which persons in the classes named in Section 191 [*sic* § 192] have in common is not that they represent debtors rather than courts, but rather that they are given possession and control of assets of debtors and are charged with the payment of debtors' obligations. . . . [A]ny 'other person' who answers this description is in

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[9] It should be noted that the district court in the case at bar cited the decision of the district court in Crocker, 194 F. Supp. 860 (D. Nev. 1961), in its opinion. The subsequent reversal of that decision by the Ninth Circuit, filed February 15, 1963, was, of course, not available to the court below at the time its opinion was prepared.

[10] United States v. Kaplan, 74 F.2d 664 (2 Cir. 1935).

cluded in Section 192, if the debtor is insolvent." United States v. Crocker, *supra* at 949.

The decisions in Stevens and Crocker, *supra*, are helpful but they cannot be deemed to be determinative of the issue presented by this appeal. The appellees here lay emphasis on the fact that in Crocker the receiver was empowered to operate the debtor's business and did so for about two years. The business was then sold by him and he distributed the proceeds of the sale to creditors other than the United States, albeit he knew of the priority claim asserted by the United States. According to the allegations of the complaint, which had to be taken as true, neither the sale of the assets nor the distribution was authorized or approved by the state court. See 194 F.Supp. 860, 861 (D. Nev. 1961). There can be no question that the receiver in Crocker had actual and effective control over the assets of the debtor. In fact, he exercised more control than that ordinarily permitted by law. He had the ability to pay out and did in fact pay out the proceeds to creditors.

The appellees also emphasize the decision in Brainwell v. United States Fid. & Guar. Co., *supra* at 490, in which the Supreme Court construed Sections 191 and 192 to impose personal liability for a priority debt due the United States "when the possession and control of the estate of the insolvent is given to any person charged with the duty of applying it to the payment of the debts of the insolvent. . . .". In Brainwell the monies belonging to an Indian tribe had been placed in an Oregon bank and the bank had been placed in the exclusive position and control of the State Superintendent of Banks to be administered according to the Oregon law under which the State Superintend- [fol. 41] ent of Banks performed the functions of assignee, receiver or trustee for the liquidation of the debts of the insolvent bank. Here, of course, the measure of control in the assignee was indeed large for the liquidator, apparently, could make distribution without reference to a court order. The appellees point out that in United States v. Crocker, *supra* at 949, the Court of Appeals for the Ninth Circuit stated that "the significant characteristic which persons in the classes named in Section 191 [*sic* 192] have in common is . . . that they are given possession and control

of assets of debtors and are charged with the payment of debtors' obligations." The appellees assert that the distributing agent was nothing more than an "amanuensis", "A person whose employment is to write from dictation, or to copy what another has written; a secretary." See Webster's International Dictionary. It is the position of the appellees that once the distribution had been established by the orders of the bankruptcy court that precise distribution became immutable, and the distributing agent, King, was bound thereon and was compelled to make distribution according to the distribution sheets or stand in contempt of the bankruptcy court. But the duties of the distributing agent in performing the final function of distribution of a debtor's estate to creditors are not different in any substantial way from those imposed on a receiver in equity, a receiver in bankruptcy, or a trustee in bankruptcy acting under the order of the court which appointed him. Changes in distribution can be effected upon timely application to the court. Negligence is apparent in the situation at bar. Moreover, in the case at bar it should be noted that King was not only the distributing agent but that prior to the Chapter XI proceeding, King was the president of the debtor corporation and well knew or should have known of the unresolved claim of the United States. Indeed, as we have pointed out at an earlier point in this opinion, Seeley's counsel stated that there would be available at all times $20,000 or more to dispose of the [fol. 42] claim of the United States "in cash". Putting it plainly, we do not think that the equities here weigh very heavily in favor of King.

We point out also that Section 192 is a very old statute. It was derived from the Act of March 2, 1799, 1 Stat. 676, and was designed for one purpose only, to aid in the collection of sums due the United States. It will be observed that the statute is exact in its terms and provides that "Every executor, administrator or assignee or other person . . . who pays . . . any debt due by the . . . estate for . . . which he acts before he . . . pays the debts due the United States from such . . . estate shall become answerable in his own person and estate", for the debt due the United States. There is nothing in the statute as to the "control" of the fund by the disbursing individual. The

critical phrase is a very uncomplex one; it is simply he "who pays". It is a statute intended by Congress as a final backstop for the protection of the federal fisc. We conclude that King is personally liable. See Field v. United States, 34 U.S. (9 Pet.) 182 (1834); United States v. Barnes, 31 Fed. 705, 707 (C.C.S.D. N.Y. 1887). See also United States v. Weisburne, 48 F. Supp. 393, 397 (E.D. Pa. 1943).

In reaching this conclusion we are not unmindful that the appellees have asserted a doctrine of estoppel against the United States. In this connection we need say only that estoppel is not available as a defense against the United States.

The judgment of the court below will be reversed. The case will be remanded with the direction to enter judgment in favor of the United States in accordance with this opinion.

[fol. 43]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,297

UNITED STATES OF AMERICA, Appellant

vs.

ELIZABETH SIMONSON KING, Executrix of the Estate of George Stewart King, Deceased, and NATIONAL SURETY CORP., a corporation of the State of New York

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On appeal from the United States District for the ..... District of New Jersey.

Present: Biggs, Chief Judge, and McLaughlin and Ganey, Circuit Judges.

JUDGMENT—September 13, 1963

This cause came on to be heard on the record from the United States District Court for the ..... District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered October 8, 1962 in this case be, and the same is hereby reversed and the cause remanded with the direction to enter judgment in favor of the United States in accordance with the opinion of this Court.

September 13, 1963.

[File endorsement omitted]

[fol. 44]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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ORDER STAYING ISSUANCE OF MANDATE—
September 25 1963

Pursuant to Rule 36 (2) of this Court, it is Ordered that issuance of the mandate in the above cause be, and it is hereby stayed until October 28, 1963.

Biggs, Chief Judge.

[File endorsement omitted]

[fol. 45] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 46]

SUPREME COURT OF THE UNITED STATES

No. 654—October Term, 1963

ELIZABETH SIMONSON KING, ETC., et al., Petitioners,

vs.

UNITED STATES

ORDER ALLOWING CERTIORARI—January 13, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.